UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 29, 2020 at 10:30 a.m.

1.	**20-23267-E-7** **GEL-1**	**SHON/JILL TREANOR** **Gabriel Liberman**	**MOTION BY GABRIEL E. LIBERMAN TO WITHDRAW AS ATTORNEY** **10-6-20 [23]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney,, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2020. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion to Withdraw as Attorney was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Withdraw as Attorney is granted.

Gabriel E. Liberman ("Movant"), counsel of record for Shon Jason Treanor and Jill Diana Treanor ("Debtor"), filed a Motion to Withdraw as Attorney as Debtor's counsel in the bankruptcy case. Movant states the following:

A. The Motion is brought pursuant to Local Bankruptcy Rule 2017-1(e) and California Rule of Professional Conduct 3-700(C)(1).

B. Counsel cannot effectively represent Debtor due to debtor attempting to take the case in a direction that the firm cannot follow and has thus render it difficult for the firm to carry out its representation within the California Rules of Professional Conduct.

C. Debtor has already been provided with a copy of the client file.

Motion, Dckt. 23.

Substitution of Attorney

On October 19, 2020, an executed Substitution of Attorney, executed by the two debtors and Counsel, was filed. Dckt. 27. In it, Debtor accepts substitutes in *pro se* in the place of Counsel.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. CAL. LOCAL R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. CAL. LOCAL R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps

reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. CAL. R. PROF'L CONDUCT 3-700(B).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

> (1) The client
>
> > (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.

CAL. R. PROF'L. CONDUCT 1.16(b)(4)(d).

DISCUSSION

To date, from reviewing the Docket there has been little litigation in this bankruptcy case. There is an Adversary Proceeding that has been filed by Steven Sanders in which Debtor, both Shon and Jill Treanor, is the defendant. 20-2160, Dckt. 1. In the Complaint, Sanders asserts having a secured claim by virtue of an attorney's lien on all trial proceeds from a Superior Court probate action in Solano County. A *pro se* answer has been filed by Debtor.

As a ground for the Motion to Withdraw as Attorney, Movant states that Debtor is attempting to pursue a course of action against the Firm's advice. Movant states in his declaration:

> Since October of 2020, irreconcilable differences between the Firm and the Debtors has [sic] arisen. Without discussing the details of such differences out of concern for attorney-client confidences, it is clear and unambiguous that the attorney-client relationship has broken down. From my communications with Debtors it is clear that Debtors wishes to take the case in a direction contrary to the Firm's advice, and the Firm should withdraw and allow Debtors to proceed as they wish.

Declaration, Dckt. 25, ¶ 3.

Movant asserts that the Firm has taken steps to minimize any prejudice to the Debtor including:

A. Notifying the Debtor of the need to withdraw and making the firm available for meetings, calls, and correspondence to discuss the issues.

B. Providing notifications regarding important upcoming dates and deadlines

C. Providing upon request, copies of documents.

D. All original files will be returned to the Debtor and the firm will only maintain copies.

Id., ¶ 5.

Here, Counsel has stated there are irreconcilable differences that require withdrawal as counsel. Moreover, on October 19, 2020, Debtors signed a Substitution of Attorney. Dckt. 27.

Furthermore, under California Rule of Professional Conduct 3-700(C)(1)(d), Debtor's conduct, such as the breakdown in the attorney-client relationship and attempting to pursue a course of action against the Firm's advice is hindering Movant's ability to carry out his employment and duties effectively. These are sufficient reasons for permissive withdrawal.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Withdraw as Attorney filed by Gabriel E. Liberman ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Withdraw as Attorney is granted, and Movant is permitted to withdraw as counsel for Shon Jason Treanor and Jill Diana Treanor ("Debtor").

2. **15-24664-E-7** **WILFRED DORAY**
HSM-3 **W. Scott de Bie**

MOTION TO EMPLOY TRANZON ASSET STRATEGIES AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES
10-8-20 [66]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Employ is granted.

The Motion to Sell property by Auction is granted.

Geoffrey Richards ("Trustee") seeks to employ Tranzon Asset Strategies ("Auctioneer") pursuant to Local Bankruptcy Rule 9014-1(f)(2) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Auctioneer to conduct an auction of certain property of the estate and authority to sell such property at auction.

Trustee argues that Auctioneer's appointment and retention is necessary to market and sell real property located at APN 036-141-55, Lot 12 in Block 03 of California Pines Lake Unit 2, Modoc County, CA ("Property"). The court summarizes the terms of employment and sale as follows (the full terms are stated in the Auction Agreement, Exhibit A, Dckt. 71):

A. Property to be sold online is vacant lot APN 036-141-55, Modoc County, California.

B. Auctioneer is authorized to use the bankruptcy case information in any advertising placed by Auctioneer.

C. Subject to bankruptcy court approval, seller is responsible for all sale related expenses necessary for Auctioneer to prepare for and conduct the sale. Expenses shall not exceed $500.00 unless approved in advance by the seller, in his sole discretion, to be reimbursed to Auctioneer following bankruptcy court approval.

D. The Property will have a published reserve price of $5,000.00.

E. Auctioneer will charge a Buyer's Premium of 10% of the high bid on the sale of the property. The Buyer's Premium is added to the high bid and becomes part of the purchase price. (The Trustee notes that Tranzon will not be charging the Bankruptcy Estate a separate commission for the sale of the Property, with the 10% Buyer's Premium functioning as a 10% commission.)

F. Auctioneer is authorized to offer a commission of 3% of the high bid to a cooperating buyer's broker, to be paid from the Buyer's Premium through escrow.

G. Seller agrees to convey legal title to the Property by Quitclaim Deed to buyer.

Tiffeny Cook, a Vice President of Tranzon Asset Strategies, testifies that she has more than 20 years of experience in the Auctioneer; and she is a disinterested party. Tiffeny Cook testifies she and the Tranzon Asset Strategies do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and

compensation of Auctioneer, considering the declaration demonstrating that Auctioneer does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Tranzon Asset Strategies as Auctioneer for the Chapter 7 Estate on the terms and conditions set forth in the Auction Agreement filed as Exhibit A, Dckt. 71.

The Trustee does not seek allowance of Tranzon's compensation at this time pursuant to the Agreement which states that the Trustee is to seek allowance of the compensation through noticed motion. Thus, approval of the 10% buyer's premium as Auctioneer's commission is subject to the provision of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

Trustee's Request for Authority to Conduct Auction

The Bankruptcy Code permits Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Trustee proposes to sell the real property located at APN 036-141-55, Lot 12 in Block 03 of California Pines Lake Unit 2, Modoc County, CA ("Property").

The terms of the sale are (the full terms are stated in the Auction Agreement, Exhibit A, Dckt. 71):

A. Trustee proposes the sale be made via online auction with Tranzon Assert Strategies as the Auctioneer.

B. Seller agrees to convey legal title to the Property by Quitclaim Deed to buyer. The sale of the estate's interest in the Property will be "as is," "where is," with no representations or warranties, express or implied, with respect to such Property, subject to all liens and encumbrances except those satisfied through the sale or of which the sale is authorized to be free and clear, and except easements, rights of way, covenants, conditions and restrictions of record, and with the buyer responsible for any and all sales, transfer, use or other taxes, and all license, registration, or other fees due or incurred in connection with the sale of the Property.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because sale of real property via auction will enable the estate to obtain the greatest possible return for the Property.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Employ filed by Geoffrey Richards ("Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Trustee is authorized to employ Tranzon Asset Strategies as Auctioneer for Trustee ("Auctioneer") on the terms and conditions as set forth in the Auction Agreement filed as Exhibit A, Dckt. 71.

IT IS FURTHER ORDERED that Trustee is authorized to sell at auction pursuant to 11 U.S.C. § 363(b) the real property located at APN 036-141-55, Lot 12 in Block 03 of California Pines Lake Unit 2, Modoc County, CA ("Property") on the terms as stated in the Auction Agreement, Exhibit A, Dckt. 71.

IT IS FURTHER ORDERED that compensation computed in the amount of 10% "buyer's premium" on the first $15,000 of aggregate gross sales proceeds resulting from the sale of the Property listed in Exhibit A to be paid by the Trustee are authorized, with all amount in excess thereof paid to the bankruptcy trustee. This is without prejudice to the auctioneer seeking payment of all or a portion of the Buyer's premium paid on the aggregate sale proceeds in excess of $15,000.00.

The above percentage fees are subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

3. **20-24123-E-11 FWP-2** **RUSSELL LESTER** **Tom Willoughby**

CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION GRANTING REPLACEMENT LIENS, MOTION SCHEDULING FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001
8-31-20 [12]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on September 2, 2020. The initial emergency hearing was conducted on August 31, 2020, and the final hearing set by order of the court for September 17, 2020.

The Motion for Authority to Use Cash Collateral is xxxxx.

Russell Wayne Lester, an individual, dba Dixon Ridge Farms ("Debtor in Possession") moves for an order approving the use of cash collateral from:

a. Cash in Debtor in Possession's bank accounts totaling $182,405.24 (of which $3,445.35 of which First Northern Bank has a security interest),

b. Cash in Receiver's account totaling $58,655.89,

c. Cash in the personal bank accounts held by Debtor in Possession's wife, Kathleen Lester, totaling $33,518.68,

d. Inventory of approximately 3,915,003 pounds of walnuts valued by the Receiver at $3,759,737, and

e. Equipment necessary to harvest over one million pounds of currently unharvested walnuts.

("Property").

Debtor in Possession requests the use of cash collateral to be able to pay critical and necessary expenses of its operations. Debtor in Possession proposes to use cash collateral for the following expenses: harvesting the 2020 walnut crop, issuing payroll and related benefits, and paying for

utilities.

Emergency First Day Order

On September 8, 2020, this court entered an emergency "first day order" authorizing the use of cash collateral on an interim basis, which also set a briefing schedule and the September 17, 2020 final hearing for this Motion. The court granted replacement liens for First Northern Bank of Dixon on the 2020 walnut crop (primed senior lien) and on the real property already subject to the Bank's deed of trust to the extent that the use of the Bank's cash collateral resulted in a reduction of the cash collateral available for that creditor.

The emergency first day order was issued with the participation of creditors having secured claims.

October 1, 2020 Hearing and Interim Order
(Civil Minutes, Order; Dckts. 190, 187)

At the October 1, 2020 hearing, agreement was reached to extend the use of cash collateral through and including October 31, 2020. Civil Minutes, Dckt. 190, at 16. This is to afford the parties time to address their communication issues and present the court with a proposed budget, whether agreed to or ordered by the court upon consideration of the arguments and evidence of the respective parties. *Id.*

The court entered its order authorizing the use of cash collateral for the Interim Period. Dckt. 187.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363, but is limited when that property is cash collateral as follows:

> (c)
> . . .
> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—
>
> > (A) each entity that has an interest in such cash collateral consents; or
> >
> > (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.
>
> (3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The

court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

Since the use of cash collateral and the concept is well known to the experienced attorneys involved in this case, the court provides the brief discussion below from COLLIER ON BANKRUPTCY on the required adequate protection if a creditor's cash collateral is being used:

[3] Form of Adequate Protection for Use of Cash Collateral

In the context of a request for authorization to use cash collateral under section 363(c)(2), it is unlikely that the creditor will be able to receive the precise equivalent of cash collateral. However, section 363 does not require precise equivalency. The special treatment afforded cash collateral recognizes its unique status as the highest and best form of collateral but also establishes that upon an appropriate showing it can be used if the rights of the secured creditor can be adequately protected. Whether adequate protection may be said to exist will depend on a number of factors, including the value of all collateral, the nature of the proposed use and the value of that which is being offered. While cases are quite varied, substitute liens, **equity cushions and operating controls have all been found sufficient**. [12] But maintaining insurance and granting a right to inspect books and records, without more, is not sufficient, where business is declining. [12a]

12. *In re James Wilson Assocs.*, 965 F.2d 160, 26 C.B.C.2d 1673 (7th Cir. 1992); *Prudential Ins. Co. v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336, 12 C.B.C.2d 323 (8th Cir. 1985); *Martin v. Commodity Credit Corp.* 761 F.2d 472, 12 C.B.C.2d 974 (8th Cir. 1985); *Crocker Nat'l Bank v. American Mariner Indus. (In re American Mariner Indus.)*, 734 F.2d 426, 10 C.B.C.2d 910 (9th Cir. 1984), overruled on other grounds, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740, 17 C.B.C.2d 1368 (1988); *Wilmington Trust Co. v. AMR Corp. (In re AMR Corp.)*, 490 B.R. 470 (S.D.N.Y. 2013). Although the grant of an administrative priority is not adequate protection, see 11 U.S.C. § 361(3), at least one court has held that where the debtor failed to give proper notice to a creditor entitled to protection and failed to provide adequate protection, section 507(b) could provide an equitable solution. *See In re Center Wholesale, Inc.*, 759 F.2d 1440, 12 C.B.C.2d 1107 (9th Cir. 1985); *see also In re California Devices, Inc.*, 126 B.R. 82, 84 (Bankr. N.D. Cal. 1991) (purpose of section 507 is to "[e]stablish a failsafe system in recognition of the ultimate reality that protection previously determined the 'indubitable equivalent' … may later prove inadequate").

12a. *In re Sterling Estates (Delaware), LLC*, 64 C.B.C.2d 1745,

3 Collier on Bankruptcy, Sixteenth Edition, ¶ 363.05[3].

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

OCTOBER 29, 2020 HEARING

As addressed at the prior hearing, the Debtor in Possession has prepared and presented a "simplified" budget form in support of the request for further use of cash collateral.

On October 14, 2020, Debtor in Possession filed the Declaration of Russell Burbank and a Simplified Budget as Exhibit A. Dckts. 206, 207. Mr. Russell Burbank is the Senior Managing Director of BPM LLC, a audit, tax, and consulting firm serving as the financial advisor to Debtor in Possession. Dckt. 206, ¶ 1. In this capacity, Mr. Burbank advises Debtor in Possession regarding the farm's financial condition and outlook and assisting with cash management. *Id.*, ¶ 2.

Mr. Burbank prepared the simplified budget now proposed by the Debtor in Possession, and testifies that it provides a streamlined form of the amended budget previously submitted (Dckt. 149) to the court and includes budget estimates for the month of December 2020. The October and November budgets remain the same. *Id.*, ¶ 6. Mr. Burbank testifies that the total estimated cash collateral needed for the November 6, 2020 through December 11, 2020 is $ $432,665, plus a 10% variance for emergencies. *Id.*, ¶ 7.

Debtor in Possession projects the following amounts as set out in the Simplified Budget, Exhibit A, Dckt. 207:

	October 2020	November 2020	December 2020
Ending Inventory	$3,951,822	$4,167,085	$4,034,855
Ending Accounts Receivable	$327,067	$407,067	$367,067

Cash Receipts For the Month	$203,037	$240,000	$674,542
Cash Disbursements for the Month	($320,725)	($233,520)	($295,668)

Response of Prudential

Prudential Insurance Company of America ("Prudential"), a creditor with a secured claim, filed its Response to the latest request for further use of cash collateral. Dckt. 222. While engaging in continuing discussions with the Debtor in Possession, Prudential continues to have reservations about the use in light of the age of the estate's nut inventory, the current state of the market for walnuts, and the value of the real properties securing its claims that the Debtor in Possession would intend to market and sell.

Notwithstanding these reservations, Prudential will consent to a further use of cash collateral through a date to be set in November 2020, on the condition that:

> (a) Prudential receiving the scheduled interest payments, as adequate protection, originally proposed in Debtor's initial 13-week budget and cash collateral motion;
>
> and
>
> (b) payment of Prudential's legal fees and costs (which is typical for a fully (if not over) secured creditor in a Chapter 11 bankruptcy case). [FN.1.]

FN. 1. While an oversecured creditor may recover legal fees and expenses as part of its secured claim, being oversecured may well mean that it is "adequately protected" with recovering those monies through the proper administration of the case and a Chapter 11 plan. However, the court also recognizes that parties working together in good faith to achieve a mutually advantageous financial result make timing accommodations consistent with the realistic recovery on claims.

Response of First Northern Bank of Dixon

First Northern Bank of Dixon ("FNBD"), a creditor with a secured claim, filed its Response to the request for further use of cash collateral. Dckt. 224. The Response summarizes the replacement liens ordered, as well as granting a first priority lien on the 2020 crop and proceeds thereof. As did Prudential, FNBD states that it too consents to the further use of cash collateral through the week ending November 27, 2020, conditioned on:

> 1. The Secured Creditors shall be granted the Replacement Liens, as set forth in the First Interim Order, the Second Interim Order, and the Third Interim Order (the "Prior Orders").
>
> At the October 29, 2020 hearing, **xxxxxxx**

4. **20-24123-E-11 FWP-12** **RUSSELL LESTER** **Thomas Willoughby**

MOTION TO ASSUME AND MODIFY FARM LEASE AND APPROVE PROCEDURE FOR SIMILAR ORDINARY COURSE FARM LEASES
O.S.T.
10-26-20 [226]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Receiver, creditors holding the twenty largest unsecured claims], creditors, parties requesting special notice, and Office of the United States Trustee on October 26, 2020. By the court's calculation, 3 days' notice was provided.

The Motion to Shorten Time was granted by the court on October 26, 2020. Dckt. 221. The court set the hearing for October 29, 2020. *Id*.

The Motion to Assume and Modify Farm Lease and Approve Procedure for Similar Ordinary Course Farm Lease was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Assume and Modify Farm Lease and Approve Procedure for Similar Ordinary Course Farm Lease is xxxxxxx .

Russell Wayne Lester, an individual, dba Dixon Ridge Farms, serving as the Debtor in Possession in this Chapter 11 case, moves for an order approving the modification of a farming lease, for which the Debtor was the lessor, and to authorize Debtor in Possession to enter into similar post-petition ordinary course of business farming leases without further court order. The Declaration of Russell Wayne Lester, the Debtor in Possession was filed in support of the Motion. Dckt. 230.

As to the modification of a lease, Debtor in Possession specifically request the court allow

Debtor to assume and modify the farming lease to allow the estate to lease out an addition of approximately 140 more acres to be farmed during the 2021 farming season. Debtor is the Lessor of 451 acres of farm land located in Solano County to J.H. Meek & Sons. The land under the terms of the Lease is subject to Prudential's deed of trust.

The Debtor in Possession also requests authority to enter into similar farm leases without further court order, but with the consent of Debtor in Possession's two largest creditors (Prudential Life Insurance Company of America and the First Northern Bank of Dixon). The Debtor in Possession anticipates collecting more net proceeds than if the Debtor in Possession grows hay on the fields again in 2021.

Debtor in Possession's Declaration

Debtor in Possession testifies that it is in the best interest of the bankruptcy estate to enter into the lease modification with the same tenant after considering the alternative uses for that specific property in 2021 and that the agreement will result in approximately $228,575 to be collected under the terms of the lease for the 2020 farming season. Dckt. 230, ¶¶ 6-8.

Debtor in Possession testifies that there is already one possible lease for tomato farming and a copy of the draft lease is provided as Exhibit 2 (Dckt. 229). *Id.*, ¶ 9. The lease is for a period of one year commencing on October 26, 2020 and terminating at the close of harvest 2021. Dckt. 229, ¶ 2. The Debtor in Possession is to receive 15% of gross receipts from the tomato crop as payment. *Id.* ¶ 3.

In his Declaration Debtor in Possession argues that, in his best business judgment, approval of the of modification of the lease and authorization to engage in similar leases is in the best interest of the bankruptcy estate and all its creditors as a whole. *Id.* ¶ 3.

APPLICABLE LAW

11 U.S.C. § 365 deals with executory contracts and unexpired leases. For the purpose of this Motion, Section 365 provides in relevant part:

> (A) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

In the Ninth Circuit, courts apply the business judgment rule when reviewing a decision to reject (and presumably to assume) an executory contract or lease. *See Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)*, 476 F.3d 665 (9th Cir. 2007). In *Agarwal*, the Ninth Circuit applied the best business judgment rule in evaluating a motion to reject an executory contract. *Id.*, at 670.

Most courts have applied a "business judgment" test to trustees' decisions to assume or reject contracts or leases. *Cor 5 Route Co. v. Penn Traffic Co. (In re Penn Traffic Co.)*, 524 F.3d 373, 383, 59 C.B.C.2d 1205 (2d Cir. 2008); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 29 C.B.C.2d 1341 (2d Cir. 1993); *PG&E Corp. v. FERC (In re PG&E Corp.)*, 2019 Bankr. LEXIS 1820, at *43 (Bankr. N.D. Cal. June 12, 2019); *In re The Great Atl. & Pac. Tea Co., Inc.*,

544 B.R. 43, 48 (Bankr. S.D.N.Y. 2016); *In re Old Carco LLC*, 406 B.R. 180 (Bankr. S.D.N.Y. 2009).

In *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 29 C.B.C.2d 1341 (2d Cir. 1993), the Court of Appeals for the Second Circuit expanded upon its prior decision in *In re Minges*, 602 F.2d 38 (2d Cir. 1979), and explained the court's role in the assumption/rejection process "as [one of] an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession, and not, as it does in other circumstances, as the arbiter of disputes between creditors and the estate." 4 F.3d 1095, 1099, 29 C.B.C.2d 1341, 1347. The court found that "a bankruptcy court reviewing a trustee's or debtor in possession's decision to assume or reject an executory contract should examine [the] contract and the surrounding circumstances and apply its best 'business judgment' to determine if it would be beneficial or burdensome to the estate to assume it." *Id.*; *see In re Tayfur*, 2015 U.S. App. LEXIS 4309 (3d Cir. Mar. 18, 2015) (not precedential) (denying landlord's motion to reject oil and gas lease since lessee would continue to have possessory rights); *Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC (In re Sabine Oil & Gas Corp.)*, 550 B.R. 59, 74 (Bankr. S.D.N.Y. 2016), aff'd, 2018 U.S. App. LEXIS 13975 (2d Cir. May 25, 2018) (unpublished); *In re The Great Atlantic & Pac. Tea Co., Inc.*, 544 B.R. 43, 48 (Bankr. S.D.N.Y. 2016).

DISCUSSION

Here, Debtor in Possession has demonstrated sound business judgment reasons for assuming the farming lease with J.H. Meek & Sons. Debtor in Possession has explained to the court that assuming this lease and modifying to add 140 more acres to be farmed is a better alternative as it will allow Debtor to collect more net proceeds that if the land was used grow hay as it usually is.

Upon review of Movant's request and cause shown, the court finds that it is in the best interest of Debtor, creditors, and the Estate to authorize Movant to assume and modify the Farming Lease with J.H. Meek & Sons for the addition of approximately 140 more acres to be farmed during the 2021 farming season.

At the hearing, xxxxxxxxxxxxxx

~~Therefore, the Motion is granted, and Movant is authorized to assume and modify the farm lease with J.H. Meek & Sons, pursuant to 11 U.S.C. § 365(a).~~

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Assume and Modify Farm Lease and Approve Procedure for Similar Ordinary Course Farm Lease filed by Russell Wayne Lester, Debtor in Possession, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and Movant is authorized to assume and modify the Farming Lease with J.H. Meek & Sons for the addition~~

~~of approximately 140 more acres to be farmed during the 2021 farming season.~~

~~The assumption of the above lease is effective upon issuance of this order, no further act of Debtor in Possession required.~~

~~**IT IS FURTHER ORDERED** that Debtor in Possession is authorized to enter into similar ordinary course farm leases subject to review and consent from Prudential Life Insurance Company of America and the First Northern Bank of Dixon.~~

5. **20-20175-E-11** **HERBERT MILLER**
UST-1 **Judson Henry Judson Henry**
5 thru 10

CONTINUED MOTION TO DISMISS CASE AND/OR MOTION FOR IMPOSITION OF A ONE-YEAR BAR AGAINST THE FILING OF A NEW CASE
7-28-20 [108]

The court has prepared a Memorandum Opinion and Decision which has been electronically sent to counsel rather than posting the document (47 pages) as a pre-hearing disposition.

6. **20-20175-E-11** **HERBERT MILLER**
20-2115 **Judson Henry**
MILLER V. JPMORGAN CHASE BANK, N.A. ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-15-20 [1]

Plaintiff's Atty: Judson H. Henry
Defendant's Atty:
Unknown [JPMorgan Chase Bank, N.A.]
John C. Steele [MTC Financial, Inc.;Trustee Corps]
Ofunne Edoziem [Caliber Home Loans, Inc.; U.S. Bank Trust, N.A.]

Adv. Filed: 6/15/20
Answer: none

Nature of Action:
Recovery of money/property - turnover of property
Validity, priority or extent of lien or other interest in property
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 10/15/20 to be heard with other matters on calendar.

The Status Conference is xxxxxxx

7. **20-20175-E-11** **HERBERT MILLER** **CONTINUED MOTION TO DISMISS**
20-2115 **Judson Henry** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

MILLER V. JPMORGAN CHASE BANK, N.A. ET AL **7-16-20 [12]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney on September 17, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is dismissed without prejudice.

The court having entered an order dismissing the related Chapter 11 case filed by Plaintiff-Debtor Herbert Miller, the basis for this court exercising federal jurisdiction over this related to matter pursuant to 28 U.S.C. § 1334(a) has terminated for all but the alleged violation of the automatic stay. Such alleged violations of the automatic stay may be addressed by motion in the bankruptcy case.

As discussed by the court in the Memorandum Opinion and Decision relating to the dismissal of Plaintiff-Debtor's bankruptcy case, the nature of the various claims and rights asserted in this Adversary Proceeding, and the years of litigation in other state and federal courts, it appears that the various non-bankruptcy claims and rights asserted are appropriate for this court to abstain, as provided in 28 U.S.C. § 1334(c)(1), from taking those matters from the state court.

The court shall issue a separate order to show cause why this court should not abstain from adjudicating the issues in this Adversary Proceeding, except for an alleged violation of the automatic stay that may be presented by motion in the bankruptcy case (the court having post-dismissal jurisdiction to adjudicate such matter), after the various non-bankruptcy issues and claims have been resolved through adjudication in the proper state or district (to the extent a non-related to bankruptcy federal jurisdictional basis exists) court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Complaint filed by Defendants Caliber Home Loans and U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust having been presented to the court, the court having dismissed the Chapter 11 bankruptcy case filed by Plaintiff-Debtor Herbert Miller, the court issuing an Order to Show Cause why the court does not abstain as provided in 28 U.S.C. § 1334 from hearing any and all related to matters and claims asserted in the Complaint, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice.

8. **20-20175-E-11 AP-1** **WILMINGTON SAVINGS FUND SOCIETY, FSB VS.**

HERBERT MILLER
Judson Henry

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
7-21-20 [98]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors and Office of the United States Trustee on July 21,2020 By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is dismissed without prejudice.

The court has granted the Motion of the U.S. Trustee to dismiss this Chapter 11 Case filed by Debtor Herbert Miller. Dismissal of the case terminates the automatic stay, rendering the present Motion for Relief From the Stay moot.

The Motion is dismissed without prejudice.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Wilmington Savings Fund Society, FSB having been presented to the court, the court having granted the Motion of the U.S. Trustee to dismiss this bankruptcy case, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed without prejudice, having been rendered moot by the dismissal of this bankruptcy case.

9. 20-20175-E-11 JHH-2 — HERBERT MILLER, Judson Henry — CONTINUED MOTION FOR ADEQUATE PROTECTION 9-17-20 [156]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Adequate Protection has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Adequate Protection is denied.

Herbert Miller, the Debtor serving as the Debtor in Possession in this case, ("Debtor/Debtor in Possession") has filed a Motion to provide adequate protection payments of $1,750 a month into a fund in lieu of a bond as required by Federal Rule of Civil Procedure 65(c) and Federal Rule of Bankruptcy Procedure 7065 in Adversary Proceeding 20-2137 against Wilmington Savings Fund

Society, FSB ("Defendant"). This would allow the Debtor/Debtor in Possession to use the automatic stay in the place of a preliminary injunction while litigating the disputes in Adversary Proceeding 20-2137. At an initial hearing on a motion for relief from the stay brought by Wilmington Savings Fund Society, FSB, the court mentioned the use of such an adequate protection payment or fund in some cases.

The court has subsequently granted the U.S. Trustee's motion to dismiss the Debtor's bankruptcy case. In dismissing the case, the related to federal court jurisdiction to adjudicate Adversary Proceeding 20-2137 has terminated.

The Motion has been rendered moot by the dismissal of the case.

Discussion of Improper Use of Adequate Protection Payment in Lieu of Preliminary Injunction

Additionally, and even if a basis for the exercise of federal court jurisdiction existed, the court has determined that the use of an adequate protection fund and have the automatic stay override the normal requirements for a preliminary injunction are not proper with respect to the Adversary Proceeding and the disputes therein. Rather, the court concludes that the requirements for a preliminary injunction as set for by the Supreme Court in Federal Rule of Civil Procedure 65(c) must be complied with for such litigation.

The use of an adequate protection fund or payment has been used by this court when there is a "simple" dispute concerning whether defaults had occurred or whether notice for a recent foreclosure had properly been given based on a disputed default in payment. These are adversary proceedings in which it is merely a payment dispute. It has also been used where there is a dispute over the ownership of a note and to whom the payments should properly be made.

Looking at the Complaint in Adversary Proceeding 20-2137, there is not a simple payment dispute, but a complex set of claims, disputes, and allegations of improper conduct by the Defendant. This is not a recent, on the eve of bankruptcy asserted foreclosure, but one that goes back years and involves litigation in other forums.

These various claims, contentions, and disputes as stated in the Complaint are summarized, and include the following.[1] The real property at issue in the Adversary Proceeding is 11155 Shadow Court, Auburn, California (the "Property"). In 2005 a person named "Bobby Homes" entered into a trust deed that was recorded against the Property. It is asserted that Countrywide Bank was the lender and MERS was the nominee.

Then, in 2010, MERS executed an assignment of the deed of trust to BAC Home Loan Servicing, LP, which assignment was recorded. Then, in 2014, MERS executed a second assignment of the deed of trust, to Owen Loan Servicing ("Ocwen"). After the second assignment, in 2014, Ocwen purported to "fully assign" the deed of trust to Christiana Trust, a division of Wilmington Savings Fund Society, as Trustee ("Christiana Trust"). This third assignment of the deed of trust was recorded.

[1] 20-2137; Complaint, Dckt. 1.

Then, in 2015, Christiana Trust creates and records further documents purporting to substitute trustees, and then making a "final assignment" to Defendant. This "final assignment" was recorded in 2016.

The deed of trust provided MERS with a narrow authority to act. It is asserted that MERS was only allowed to act as an "incidental beneficiary" and not that of an "equitable beneficiary." It is asserted that MERS could not transfer any equitable rights. Therefore, MERS could not convey the right to receive payment on the obligation secured by the deed of trust.

Further, that in 2007, the United States Federal Reserve Bank "orchestrated a 'fire sale' of Countrywide Bank to Bank of America, at ten percent [10%] of Countrywide's former value." Countrywide Bank was then merged into Bank of America to consummate the "fire sale."

Going back to 2008, it is alleged that Countrywide was incapacitated and MERS could not hold any relationship to Countrywide. The various purported deeds of trust over a decade were not effective and void.

Debtor/Debtor in Possession asserts that in 2016 he "secured an equitable interest" in the Property. This "equitable interest" was memorialized by a grant deed executed by Bobby Holmes, which was recorded. Debtor/Debtor in Possession claims all right, title, and interest to the Property, and any and all claims that Bobby Holmes may have had relating to the Property prior to 2016.

Debtor/Debtor in Possession asserts that in 2016 he immediately contacted the then purported loan servicer to address the notice of default that had been recorded. Debtor/Debtor in Possession asserts that over the next 12 months of communications, Defendant made promises of settling the amount that was in default, but actually was just running up the amounts asserted to be due by causing delay.

At that time, Debtor/Debtor in Possession states that he began investigating the ownership of the deed of trust and obligation secured by it, and discovered the above described void transfers.

In 2018, Defendant's servicer executed and recorded a substitution of trustee under the deed of trust. Debtor/Debtor in Possession asserts that such substitution is void, it being part of the void assignments dating back to 2008. Then, in 2018, the purported substitute trustee under the deed of trust noticed a default. It is asserted that this notice of default is void, being in the chain of void assignments dating back to 2008.

In 2018, a notice of sale was issued by the trustee under the deed of trust. It is asserted that this notice of sale is void, being in the chain of void assignments dating back to 2008. Then, in November 2018, a purported trustee's deed was issued as part of an alleged nonjudicial foreclosure on the Property. It is asserted that this trustee's deed is void, it being in the line of void assignments dating back to 2008.

The allegations continue, asserting that all of the defendants in the Adversary Proceeding have acted negligently with respect to the assignments and that they breached their duties by proceeding to act on the void documents. Further, that the defendants recorded false instruments improperly effecting the title to the Property.

In the first claim for relief Debtor/Debtor in Possession asserts that beginning with Ocwen and continuing thereafter, no interest in the deed of trust was acquired by Defendant and Defendant could acquire no interest in the Property. Debtor/Debtor in Possession seeks to have the court determine that there was a wrongful foreclosure, and have adjudicated the ownership of the Property as between Debtor/Debtor in Possession and Defendant. Further, that based on the conduct of defendants, Debtor/Debtor in Possession has been damaged and is entitled to monetary recovery.

The second claim for relief is stated to be slander of title. This is based on the 2018 recorded trustee's deed upon foreclosure sale. It is asserted that the trustee's deed is void, for the reasons stated above, and improperly clouds Debtor/Debtor in Possession's title to the Property. Debtor/Debtor in Possession has been damaged and is entitled to monetary recovery.

The third claim for relief is titled "Cancellation on Cloud of Title." It is asserted that since the foreclosure deed is void, judgment needs to be entered to clear it from record title for the Property.

The fourth claim for relief is one to quiet title as between Debtor/Debtor in Possession and Defendant. Based on there being allegedly void assignments and an alleged void trustee's deed, the court needs to quiet title to the Property.

The fifth claim for relief is for negligence against all of the defendants. It is asserted that the notice of default, notice of sale, and trustee's deed after foreclosure were improperly and negligently recorded. It is asserted that the various substitutions and assignments are void. Due to their negligence, Debtor/Debtor in Possession asserts that he was "hurt and injured in his health, strength, activity, sustaining injury to his nervous system and person . . .to cause. . . great mental, physical, emotional, and nervous pain and suffering." This has caused Debtor/Debtor in Possession to suffer general damages.

Clearly, the above is not a "simple" dispute over the amount of a payment or who a creditor is. Rather, it deals with more than a decade of real property recordings, defaults and a foreclosure two years ago.

Use of Adequate Protection Method Not Appropriate

Here, the dispute between Debtor/Debtor in Possession and Defendant is not a simple amount of payment or identification of the correct party to pay. Rather, it is a complex, decade long dispute over title to real property and the possession thereof. For such a dispute, if one party seeks to prevent another from asserting its right of ownership and possession of property, the path for relief is to obtain a preliminary injunction. The Supreme Court has adopted Federal Rule of Civil Procedure 65, which is incorporated into Federal Rule of Bankruptcy Procedure 7065, for when and how such a preliminary injunction is obtained. One requirement for the issuance of a preliminary injunction is the requirement of the party seeking the injunction posting security:

> (c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security

Fed. R. Civ. P. 65(c). The purpose of the required security is discussed in 13 Moore's Federal Practice, Civil § 65.50[3] (2020), as follows:

> [3] Purpose of Security Is to Pay Costs and Damages Incurred by Wrongfully Enjoined or Restrained Party
>
> The purpose of requiring security prior to issuance of an injunction or a restraining order is to guarantee payment of costs and damages sustained by a party who is wrongfully enjoined or restrained. However, the proceeds from the bond may not be applied to compensate for attorney's fees.

While the use of an "adequate protection fund" may work with a simple dispute, here it is complex, potentially long term litigation. Defendant asserts the right to the possession of the Property, not merely that there are some defaulted payments.

In reviewing the proposal of $1,750 a month adequate protection fund payment in lien of the Rule 65(c) bond, Debtor/Debtor in Possession computes it based on an amount of $400,000. Motion, p. 4:20-24; Dckt. 161. This is not stated to be based on what Defendant could be damaged if Defendant prevails, but is stated to be the dollar amount "[Debtor/Debtor in Possession] contemplates that if he prevails, the result will be a secured claim somewhere about or at least $400,000." Following the court's comments about how it has used this process in simple disputes, Debtor/Debtor in Possession then amortizes that amount over 30 years at a 3.25% interest rate.

The first fallacy in the computation is that Debtor/Debtor in Possession bases it on what the debt would be if he prevails, not the damages that Defendant will suffer if Defendant prevails (which is the purpose of the required Rule 65(c) security). The damage to Defendant will not be if Debtor/Debtor in Possession prevails, but that Defendant has been denied possession of the Property while Debtor/Debtor in Possession has retained possession during the litigation.

In the "simple" situations were there is only a dispute over the amount of the default or a recent foreclosure, if the adequate protection fund process can be used, the court bases the adequate protection payments on the amount of the payment required on the underlying secured obligation. If the parties cannot agree on that, the court has computed it based on the full fair market value of the property in dispute, amortizing a 100% loan over thirty years.

On Amended Schedule A/B, Debtor states that the Property has a value of $600,000. Dckt. 29 at 10. The court has not been presented with any evidence as to the value of the Property. In looking at Debtor/Debtor in Possession's prior bankruptcy filings, he did not list the Property in his 2019 case, but did list it on Schedule A/B in his 2018 case. On one page of Schedule A/B in the 2018 case, Debtor/Debtor in Possession states under penalty fo perjury that the Property had a value then of $800,000. 18-26373; Dckt. 13 at 3. But on another page of Schedule A/B in the 2018 case, Debtor/Debtor in Possession lists the Property as having a value of $1,569,861. *Id*. at 4.

It is commonly known in the Sacramento Region that since 2018 and continuing through 2020, the prices of residential real estate has been increasing. It is likely that the current value, not what Debtor/Debtor in Possession believes will be owed on the debt secured by the Property if he prevails and Defendant is defeated, is $800,000/$1.5 Million plus.

In a simple case, which this is not, an $800,000 value, amortized over 30 years, with a 100% loan to value interest rate of 5.00% (the court having seen hard money rates of 11.5% for less then 100% loan to value ratios), would be monthly payments of $4,300.

However, as discussed above, this is not a "simple" dispute, but a knock down, drag out litigation for which the requirements of Federal Rule of Civil Procedure 65(c) security is required.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Adequate Protection payments filed by Debtor/Debtor in Possession Herbert Miller having been presented to the court, the court having dismissed the bankruptcy case, the federal related to jurisdiction pursuant to 28 U.S.C. § 1334(a) for the Adversary Proceeding to which the payments were to relate having terminated, the issues in the Adversary Proceeding being ones subject to abstention pursuant to 28 U.S.C. § 1334(c), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

10. 20-20175-E-11 JHH-3 — HERBERT MILLER, Judson Henry — CONTINUED MOTION FOR ADEQUATE PROTECTION, 9-17-20 [161]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Adequate Protection has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Adequate Protection is denied.

Herbert Miller, the Debtor serving as the Debtor in Possession in this case, ("Debtor/Debtor in Possession") has filed a Motion to provide adequate protection payments of $1,750 a month into a fund in lieu of a bond as required by Federal Rule of Civil Procedure 65(c) and Federal Rule of Bankruptcy Procedure 7065 in Adversary Proceeding 20-2115 against US Bank Trust, N.A., as Trustee ("Defendant"). This would allow the Debtor/Debtor in Possession to use the automatic stay in the place of a preliminary injunction while litigating the disputes in Adversary Proceeding 20-2115. At an initial hearing on a motion for relief from the stay brought by Wilmington Savings Fund Society, FSB, the court mentioned the use of such an adequate protection payment or fund in some cases.

The court has subsequently granted the U.S. Trustee's motion to dismiss the Debtor's bankruptcy case. In dismissing the case, the related to federal court jurisdiction to adjudicate Adversary Proceeding 20-2137 has terminated.

The Motion has been rendered moot by the dismissal of the case.

Discussion of Improper Use of Adequate Protection Payment in Lieu of Preliminary Injunction

In connection with a related request for creation of an adequate protection fund in lieu of Defendant/Debtor obtaining a preliminary injunction in the adversary proceeding in which the ownership of the Property is disputed, the court provided an extensive discussion as to why the use of the adequate protection fund was not appropriate. Motion, DCN: JHH-2 Civil Minutes for October 29, 2020 hearing. The court does not repeat them here, but incorporates herein by this reference.

The dispute with Defendant over the ownership of the property commonly known as 315 Hilton Drive, Applegate, California (the "Property") in Adversary Proceeding 20-2115 is as complex as the litigation discussed in the Motion (JHH-2) involving Wilmington Savings Fund Society, FSB ("Wilmington"), and more so.

The Complaint filed by Debtor/Debtor in Possession in Adversary Proceeding 20-2115 includes claims for: (1) Intentional Interference with Economic Relations, (2) Negligent Intentional [sic] with Economic Relationship, (3) Wrongful Foreclosure, (4) Negligent Misrepresentation, (5) Quiet Title; and (6) Conversion. 20-2115; Dckt. 1.

In the Complaint, Debtor/Debtor in Possession alleges that Defendant is not registered with the FDIC nor the State of California. It is asserted that Defendant wrongfully asserts ownership of the Property based on a trustee's deed after foreclosure that was recorded in 2017. Debtor/Debtor in Possession asserts that he entered into a "quasi-contract" that was recorded in 2007. He disputes that there was any contract capable of being formed by the instruments he signed – a promissory note and deed of trust purporting to secure the note. He challenges the legality of "table funding" and that an enforceable obligation is owing therefrom.

Debtor/Debtor in Possession proceeds addressing events beginning in 2007 and continuing for years thereafter. He asserts that he did not have the grant deed for the Property until November 7, 2007, and therefore any deed of trust he granted on November 6, 2007 was of no legal force and effect. He further asserts that the identities of the parties who were purporting to lend him the money to be evidenced by the note and secured by the deed of trust were not disclosed. He asserts that the escrow instructions and other loan documents were not provided to him.

Debtor/Debtor in Possession states that the various purported assignments of the deed of trust are void, there are "fictitious lenders" in the loan documents, and that there is no right to payment on the purported loan documents.

He further challenges JPMorgan Chase's (Defendant's predecessor in interest in the note and deed of trust) alleged purchase of the note and the ability of the FDIC to transfer the note and deed of trust. It is asserted that the defendants recorded incorrect and misleading documents. It is further alleged that the defendants have failed to comply with various provisions of the California Civil Code relating to foreclosures, accuracy of documents, and providing accurate notices.

It is asserted that the foreclosure on the Property in 2017, based upon the deed of trust recorded in 2007, is void and was wrongful. Further, that the recording of the trustee's deed after foreclosure by which Defendant asserts it owns the Property was wrongful.

As the court discussed in the Memorandum Opinion and Decision, there has been other litigation between these parties. Debtor/Debtor in Possession asserts that he was evicted from the Property in 2018. Additionally, that in 2018 the locks were changed on the Property. Debtor/Debtor in Possession asserts that such eviction from the Property was wrongful.

It is further asserted that personal property of the Debtor/Debtor in Possession was converted by Defendant, with such property having a value of at least $52,000.

The first claim for relief states that there was to be a $440,000 loan, but it was not properly made to Debtor/Debtor in Possession. That due to the wrongful foreclosure, Debtor/Debtor in Possession has damages for expenses in responding to actions taken by Defendant, loss of quiet enjoyment of the Property, loss of rental income, and loss of personal property. Additionally, Debtor/Debtor in Possession asserts the right to punitive damages. The second cause of action seeks the same relief, based on a negligence claim.

The third cause of action is for wrongful foreclosure, and for the court to identify the "actual lender" to whom $440,000 would be owed. It is unclear how the court would provide such service for Debtor/Debtor in Possession. The fourth cause of action asserts that the 2017 foreclosure is void. The fifth cause of action seeks to have the court quite title based on the allegedly void documents dating back to 2007. The sixth cause of action is for conversion of various items of personal property that is alleged to have occurred in 2018.

On Amended Schedule A/B Debtor/Debtor in Possession in the current case lists the Property as having a value of $500,000. Dckt. 79 at 10. The court does not find the Property listed on the Schedules filed by Debtor/Debtor in Possession in his 2019 case (19-23392) and 2018 case (18-26373). Debtor/Debtor in Possession did disclose it on Schedule A filed in his 2013 case, listing it as having a value of $150,000 and being encumbered by an obligation in the amount of ($459,000). 13-23040; Schedule A, Dckt. 1 at 11.

As with the other motion for adequate protection, the "adequate protection payment" is based on what Debtor/Debtor in Possession believes would be owed if he prevails and Defendant loses, not the damages to Defendant if Debtor/Debtor in Possession loses: "[Debtor/Debtor in Possession] contemplates that if he prevails, the result will be a secured claim somewhere about or at least $400,000." Motion, p. 4:19-20; Dckt. 161.

The requirement in Federal Rule of Civil Procedure 65(c) and Federal Rule of Bankruptcy Procedure 7065 for security to support a preliminary injunction is not for what Debtor/Debtor in Possession will owe if he wins, but the damages caused by the deprivation of the Property from Defendant.

The Supreme Court has adopted Federal Rule of Civil Procedure 65, which is incorporated into Federal Rule of Bankruptcy Procedure 7065, for when and how such a preliminary injunction is obtained. One requirement for the issuance of a preliminary injunction is the requirement of the party seeking the injunction posting security:

> (c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to

> have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security

Fed. R. Civ. P. 65(c). The purpose of the required security is discussed in 13 Moore's Federal Practice, Civil § 65.50[3] (2020), as follows:

> [3] Purpose of Security Is to Pay Costs and Damages Incurred by Wrongfully Enjoined or Restrained Party
>
> The purpose of requiring security prior to issuance of an injunction or a restraining order is to guarantee payment of costs and damages sustained by a party who is wrongfully enjoined or restrained. However, the proceeds from the bond may not be applied to compensate for attorney's fees.

While the use of an "adequate protection fund" may work with a simple dispute, here it is complex, potentially long term litigation. Defendant asserts the right to the possession of the Property, not merely that there are some defaulted payments.

In reviewing the proposal of $1,750 a month adequate protection fund payment in lien of the Rule 65(c) bond, Debtor/Debtor in Possession computes it based on an amount of $400,000. Motion, p. 4:12-14; Dckt. 156. This is not stated to be based on what Defendant could be damaged if Defendant prevails, but is stated to be the dollar amount "[Debtor/Debtor in Possession] contemplates that if he prevails, the result will be a secured claim somewhere about or at least $400,000." Following the court's comments about how it has used this process in simple disputes, Debtor/Debtor in Possession then amortizes that amount over 30 years at a 3.25% interest rate.

The first fallacy in the computation is that Debtor/Debtor in Possession bases it on what the debt would be if he prevails, not the damages that Defendant will suffer if Defendant prevails (which is the purpose of the required Rule 65(c) security). The damage to Defendant will not be if Debtor/Debtor in Possession prevails, but that Defendant has been denied possession of the Property while Debtor/Debtor in Possession has retained possession during the litigation.

In the "simple" situations were there is only a dispute over the amount of the default or a recent foreclosure, if the adequate protection fund process can be used, the court bases the adequate protection payments on the amount of the payment required on the underlying secured obligation. If the parties cannot agree on that, the court has computed it based on the full fair market value of the property in dispute, amortizing a 100% loan over thirty years.

On Amended Schedule A/B, Debtor states that the Property has a value of $500,000. Dckt. 29 at 10. The court has not been presented with any evidence as to the value of the Property.

In a simple case, which this is not, a $500,000 value, amortized over 30 years, with a 100% loan to value interest rate of 5.00% (the court having seen hard money rates of 11.5% for less then 100% loan to value ratios), would be monthly payments of $2,700.

However, as discussed above, this is not a "simple" dispute, but a knock down, drag out litigation for which the requirements of Federal Rule of Civil Procedure 65(c) security is required.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Adequate Protection payments filed by Debtor/Debtor in Possession Herbert Miller having been presented to the court, the court having dismissed the bankruptcy case, the federal related to jurisdiction pursuant to 28 U.S.C. § 1334(a) for the Adversary Proceeding to which the payments were to relate having terminated, the issues in the Adversary Proceeding being ones subject to abstention pursuant to 28 U.S.C. § 1334(c), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

FINAL RULINGS

11. **20-20507-E-7 HLG-1** | **SONIC EXPRESS, LLC** **Gary Zilaff** | **CONTINUED MOTION FOR PROTECTIVE ORDER 8-20-20 [38]**

Pursuant to prior Order of the court (Dckt. 204), the Motion for Protective Order has been dismissed as stipulated by the Parties (Dckt. 160), and this Matter is removed from the calendar.

12. **20-20507-E-7 HLG-4** | **SONIC EXPRESS, LLC** **Gary Zilaff** | **CONTINUED MOTION FOR ABSTENTION AND/OR MOTION FOR RELIEF FROM AUTOMATIC STAY 8-21-20 [87]**

INDERBIR SINGH VS.

Pursuant to prior Order of the court(Dckt. 209), the Motion for Abstention and Relief from the Automatic Stay has been dismissed as stipulated by the Parties (Dckt. 160), and this Matter is removed from the calendar.

13. 20-21616-E-7 KLS AIR EXPRESS INC. DBA FREIGHT SOLUTION
Daniel Egan

CONTINUED AMENDED OPPOSITION/OBJECTION TO CHAPTER 7 TRUSTEE'S REPORT OF NO DISTRIBUTION
7-27-20 [24]

Final Ruling: No appearance at the October 29, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on July 27, 2020. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Amended Objection to Chapter 7 Trustee's Report of No Distribution has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

Pursuant to prior Order of the court (Dckt. 51), by stipulation of the Parties, the hearing on the Amended Opposition/Objection to the Chapter 7 Trustee's Report of No Distribution has been continued to 10:30 a.m. on December 10, 2020.

October 13, 2020 Stipulation

The Parties requested continuance of the October 29, 2020 hearing to December 10, 2020 on the basis that TRM is presently conducting discovery regarding avoidable transfers and bank accounts belonging to Debtor which will not be completed prior to the October 29, 2020. Dckt. 49.

The court's order granting the continuance to December 10, 2020 at 10:30 a.m was entered on October 16, 2020. Dckt. 51.